149 FERC ¶ 61,078
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Chairman;
Philip D. Moeller, Tony Clark,
and Norman C. Bay.

Duke Energy Corporation	Docket Nos.	EC11-60-002
Progress Energy, Inc.		EC11-60-003
		EC11-60-004
		EC11-60-005
Carolina Power & Light Company		ER12-1339-002
		ER12-1340-002
		ER12-1341-002
Duke Energy Carolinas, LLC		ER12-1342-002

ORDER DENYING REHEARING AND GRANTING MOTION TO SUPPLEMENT COMPLIANCE FILING

(Issued October 29, 2014)

1. On April 4, 2011, pursuant to sections 203(a)(1) and 203(a)(2) of the Federal Power Act[1] and Part 33 of the Commission's regulations,[2] Duke Energy Corporation (Duke Energy) and Progress Energy, Inc. (Progress Energy) (together, with their public utility subsidiaries, Applicants) filed an application for the approval of a transaction pursuant to which Progress Energy would become a wholly-owned subsidiary of Duke Energy and the former shareholders of Progress Energy would become shareholders of Duke Energy (Merger).[3] In its initial order on the Merger, the Commission conditionally

[1] 16 U.S.C. § 824b(a)(1) and (a)(2) (2012).

[2] 18 C.F.R. pt. 33 (2013).

[3] Application for Authorization of Disposition of Jurisdictional Assets and Merger under Sections 203(a)(1) and 203(a)(2) of the Federal Power Act, Docket No. EC11-60-000 (Apr. 4, 2011) (Merger Application).

authorized the transaction, subject to Commission approval of market power mitigation measures to address the effects of the Merger on competition.[4] In response, Applicants filed a mitigation proposal,[5] which the Commission did not accept.[6] Subsequently, Applicants filed a second mitigation proposal[7] which the Commission accepted.[8] Several parties requested rehearing of the Commission's three orders on the Merger.

2. On December 6, 2013, Applicants filed a motion to supplement the March 2012 Compliance Filing, which contained Applicants' second mitigation proposal, and which the Commission accepted in the June 2012 Merger Order.[9]

3. In this order, we address the requests for rehearing of the September 2011, December 2011, and June 2012 Merger Orders (collectively, Merger Orders), and the Motion to Supplement the March 2012 Compliance Filing.

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[4] *Duke Energy Corporation*, 136 FERC ¶ 61,245, at P 117 (2011) (September 2011 Merger Order).

[5] Compliance Filing of Duke Energy Corporation and Progress Energy, Inc., Docket No. EC11-60-001 (Oct. 17, 2011) (October 2011 Compliance Filing).

[6] *Duke Energy Corporation*, 137 FERC ¶ 61,210 (2011) (December 2011 Merger Order).

[7] Revised Compliance Filing of Duke Energy Corporation and Progress Energy, Inc., Docket No. EC11-60-004 (Mar. 26, 2012). On April 10, 2012, Commission staff requested additional information regarding the March 26, 2012 compliance filing. On April 13, 2012, Applicants filed their response to that request. The March 26, 2012 compliance filing, as supplemented by Applicants' April 13, 2012 response, is referred to as the March 2012 Compliance Filing.

[8] *Duke Energy Corporation*, 139 FERC ¶ 61,194 (2012) (June 2012 Merger Order).

[9] Motion of Duke Energy Corporation to Supplement Compliance Filing, Docket No. EC11-60-004 (Dec. 6, 2013) (Motion to Supplement). Although the merged firm filed the Motion to Supplement, in this order we continue to refer to Applicants so as to retain consistent nomenclature across the orders related to the Merger. Where appropriate, we refer individually to some of the Applicants.

I. Background

A. Overview of the Merger Orders

4. In the September 2011 Merger Order, the Commission evaluated the Merger pursuant to the Commission's Merger Policy Statement[10] and found that Applicants had not shown that the Merger would not have an adverse effect on horizontal competition in the Duke Energy Carolinas[11] and Progress Energy Carolinas-East[12] Balancing Authority

[10] *See Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, FERC Stats. & Regs. ¶ 31,044 (1996), *reconsideration denied*, Order No. 592-A, 79 FERC ¶ 61,321 (1997) (Merger Policy Statement). *See also FPA Section 203 Supplemental Policy Statement*, 72 Fed. Reg. 42,277 (Aug. 2, 2007), FERC Stats. & Regs. ¶ 31,253 (2007) (Supplemental Policy Statement). *See also Revised Filing Requirements Under Part 33 of the Commission's Regulations*, Order No. 642, FERC Stats. & Regs. ¶ 31,111 (2000), *order on reh'g*, Order No. 642-A, 94 FERC ¶ 61,289 (2001). *See also Transactions Subject to FPA Section 203*, Order No. 669, FERC Stats. & Regs. ¶ 31,200 (2005), *order on reh'g*, Order No. 669-A, FERC Stats. & Regs. ¶ 31,214, *order on reh'g*, Order No. 669-B, FERC Stats. & Regs. ¶ 31,225 (2006). *See also Analysis of Horizontal Market Power under the Federal Power Act*, Notice of Inquiry, FERC Stats. & Regs. ¶ 35,571 (2011), *Order Reaffirming Commission Policy and Terminating Proceeding*, 138 FERC ¶ 61,109 (2012).

[11] Duke Energy Carolinas transmits, distributes, and sells electricity to customers within its franchised service territory in North Carolina and South Carolina, and is authorized to sell energy, capacity, and ancillary services at market-based rates outside of the Duke Energy Carolinas Balancing Authority Area. September 2011 Merger Order, 136 FERC ¶ 61,245 at P 5.

[12] Progress Energy Carolinas serves retail customers in North Carolina, and is authorized to sell power at market-based rates outside of the Progress Energy Carolinas Balancing Authority Area. *Id.* PP 15-16. The Progress Energy Carolinas Balancing Authority Area is divided into two Balancing Authority Areas: the Progress Energy Carolinas-East and Progress Energy Carolinas-West Balancing Authority Areas. Neither Progress Energy Florida nor Progress Energy Carolinas have market-based rate authority for sales inside Peninsular Florida, which is defined as the state of Florida except the area in the western panhandle served by Southern Company. *Id.* at n.21 (citing *Carolina Power & Light Company*, 128 FERC ¶ 61,053 (2009) and *Florida Power Corporation*, 133 FERC ¶ 61,131 (2005)).

Areas.[13] The Commission conditionally authorized the Merger, subject to its approval of market power mitigation, including, but not limited to, membership in a Regional Transmission Organization; implementation of an independent coordinator of transmission arrangement; generation divestiture; virtual divestiture; and/or transmission upgrades.[14] The Commission directed Applicants to make a compliance filing within 60 days of the date of the September 2011 Merger Order proposing market power mitigation sufficient to remedy the market power screen failures identified in that order. Several parties, including Applicants, requested rehearing of the September 2011 Merger Order.

5. In response to the September 2011 Merger Order, Applicants filed the October 2011 Compliance Filing, wherein they proposed to adopt the virtual divestiture option suggested by the Commission in the September 2011 Merger Order. Applicants stated that the proposed mitigation consisted of a "must offer" obligation for Applicants to "sell specific quantities of energy at cost-based rates to entities that serve load, directly or indirectly" in the Duke Energy Carolinas and Progress Energy Carolinas-East Balancing Authority Areas.[15] The Commission did not accept the October 2011 Compliance Filing in the December 2011 Merger Order, explaining that the mitigation proposal did not remedy the Merger's effects on competition or the market power screen failures identified in the September 2011 Merger Order. The Commission noted, however, that the Merger remained conditionally authorized, subject to Commission approval of market power mitigation measures that remedied the market power screen failures identified in the September 2011 Merger Order. Applicants requested rehearing of the December 2011 Merger Order.

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[13] September 2011 Merger Order, 136 FERC ¶ 61,245 at P 117. Applicants performed a Delivered Price Test, also referred to as an Appendix A analysis, to determine the pre- and post-transaction market shares from which the market concentration or Herfindahl-Hirschman Index (HHI) change can be derived. The HHI is a widely accepted measure of market concentration, calculated by squaring the market share of each firm competing in the market and summing the results. Although Applicants asserted that their Appendix A analysis demonstrated that the Merger would have no adverse impact on competition, as more fully discussed below, the Commission found that there were numerous market power screen failures (as indicated by the magnitude of HHI changes) in multiple seasons/load periods in the Duke Energy Carolinas and Progress Energy Carolinas-East Balancing Authority Areas.

[14] September 2011 Merger Order, 136 FERC ¶ 61,245 at P 117.

[15] October 2011 Compliance Filing at 3.

6. Applicants filed the March 2012 Compliance Filing in response to the December 2011 Merger Order. In the March 2012 Compliance Filing, Applicants proposed interim market power mitigation, in the form of executed power sales agreements with specific buyers (Power Sales Agreements), and permanent market power mitigation, in the form of seven transmission expansion projects. As part of the permanent market power mitigation, Applicants also proposed to set aside 25 megawatts (MW) of transmission capacity from the Duke Energy Carolinas Balancing Authority Area to the Progress Energy Carolinas-East Balancing Authority Area that would be available for reservation only by unaffiliated third parties on a firm basis in the summer off-peak season/load period (Stub Mitigation).[16] Applicants claimed that the interim market power mitigation would address the market power screen failures during the three years that it would take to construct and finalize the transmission expansion projects, and that the transmission expansion projects and the Stub Mitigation would address the market power screen failures on a permanent basis. In the June 2012 Merger Order, the Commission accepted, subject to certain revisions, the interim and permanent market power mitigation, including the Stub Mitigation, proposed by Applicants. Several parties requested rehearing of the June 2012 Merger Order.

B. Motion to Supplement the March 2012 Compliance Filing

7. In the Motion to Supplement, Applicants explain that they have identified new information relevant to the transmission expansion projects that the Commission accepted as part of the permanent market power mitigation in the June 2012 Merger Order.[17] Applicants state that they conducted an independent review of the March 2012 Compliance Filing in order to confirm the accuracy of the data and analyses submitted with that filing after management became aware of an anonymous letter submitted to the Commission in June 2012 claiming the March 2012 Compliance Filing contained misleading information.[18] According to Applicants, the additional information affects the calculation of the impacts of the permanent market power mitigation and may require increasing the amount of Stub Mitigation. The Motion to Supplement is discussed in further detail below.

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[16] March 2012 Compliance Filing at 16-19.

[17] Motion to Supplement at 1.

[18] *Id.* at 2.

II. Notices

8. Notice of the Motion to Supplement was published in the *Federal Register*, 78 Fed. Reg. 76,605 (2013), with comments due on before February 4, 2014.[19]

9. On February 4, 2014, the City of New Bern, North Carolina (City of New Bern) filed an answer to the Motion to Supplement.[20] On February 19, 2014, Applicants filed a motion for leave to answer and answer to City of New Bern's answer.

10. On March 4, 2014, the Director of the Division of Electric Power Regulation-West issued a request for additional information from Applicants (Request for Additional Information). On March 21, 2014, Duke Energy filed a motion for additional time to respond to the Request for Additional Information.[21] The motion for additional time was granted, to and including March 28, 2014. Applicants filed their response to the Request for Additional Information on March 28, 2014 (Applicants March 2014 Response).

11. Notice of Applicants March 2014 Response was published in the *Federal Register*, 79 Fed. Reg. 19,325 (2014), with comments due on April 18, 2014. On April 18, 2014, City of New Bern filed a protest of Applicants March 2014 Response. On May 5, 2014, Applicants filed a motion for leave to answer and answer to City of New Bern's protest.

III. Procedural Matters

12. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure[22] prohibits an answer to a protest unless ordered by the decisional authority. We will accept the

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[19] On December 12, 2013, the comment date on the Motion to Supplement was shortened to December 27, 2013. On December 13, 2013, the notice shortening the comment date to December 27, 2013 was rescinded and the original February 4, 2014 comment date reinstated.

[20] Some of the pleadings submitted prior to City of New Bern's February 4, 2014 answer were filed by the Cities of New Bern and Rocky Mount, North Carolina, and the Commission referred to them jointly as City of New Bern in the Merger Orders. Although City of New Bern filed the February 4, 2014 answer without the City of Rocky Mount, North Carolina, in this order we continue to refer to City of New Bern so as to retain consistent nomenclature across the orders related to the Merger.

[21] City of New Bern filed an answer to the motion for additional time on the same day.

[22] 18 C.F.R. § 385.213(a)(2) (2013).

answers filed in this proceeding because they have provided information that assisted us in our decision-making process.

IV. Discussion

13. As noted above, several parties requested rehearing of the Merger Orders, raising various issues. In this order, the Commission first addresses the requests for rehearing of those orders and then discusses the Motion to Supplement.

A. Requests for Rehearing of the Merger Orders

1. Whether the Commission Departed from Precedent by Relying on Price Sensitivity Studies.

a. The September 2011 Merger Order

14. In the September 2011 Merger Order, the Commission found, based on the results of Applicants' August 29, 2011 Delivered Price Test (August 29 Delivered Price Test), that the Merger would result in market power screen failures across multiple seasons/load periods in the Duke Energy Carolinas Balancing Authority Area.[23] The August 29 Delivered Price Test showed that, in the base case, Applicants failed the market power screens in three seasons/load periods, including two in the summer.[24] The Commission

[23] As explained in more detail in the September 2011 Merger Order, the Commission focused on the results of the August 29 Delivered Price Test because that study was based on Electric Quarterly Report price data. The Delivered Price Test that Applicants originally submitted with the Merger Application was based on system lambda. In the September 2011 Merger Order, the Commission explained its preference that Delivered Price Tests use actual market prices rather than price proxies such as system lambda. September 2011 Merger Order, 136 FERC ¶ 61,245 at P 121.

[24] In the September 2011 Merger Order, the Commission observed that every Delivered Price Test should address three scenarios: "the base case, in which applicants should use appropriate forecasted market prices to model post-merger competition in the study area, and sensitivity analyses of the base case that measure the effect of increasing or decreasing the market prices relative to the base case." *Id.* P 118. The Commission explained further that each scenario is examined over 10 seasons/load periods, which, in this case, Applicants labeled summer super-peak 1, summer super-peak 2, summer peak, summer off-peak, winter super-peak, winter peak, winter off-peak, shoulder super-peak, shoulder peak, and shoulder off-peak. *Id.* (citing *AEP Power Marketing, Inc.*, 107 FERC ¶ 61,018, at 61,087, Appendix F (2004) (setting out 10 seasons/load periods in staff

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noted that these failures occurred in seasons/load periods where Applicants had large market shares and also involved large HHI increases.[25] The 10 percent price increase and decrease sensitivity analyses showed additional screen failures.[26]

15. The August 29 Delivered Price Test also showed that the Merger would result in market power screen failures in the Progress Energy Carolinas-East Balancing Authority Area. The August 29 Delivered Price Test showed, for example, a market power screen failure in the summer off-peak season/load period where the post-merger HHI was 2,194, an increase in HHI of 894 points, and the market share was 45.5 percent.[27] The 10 percent increase and decrease scenarios also showed additional screen failures.[28]

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summary regarding steps in the Delivered Price Test); Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,130 ("Applicants should present separate analyses for each of the major periods when supply and demand conditions are similar. One way to do this it to group together the hours when supply and demand conditions are similar; for example, peak, shoulder, and off-peak hours.")).

[25] In the base case, the post-merger HHI for summer super-peak 2 was 2,349, an increase in HHI of 72 points; for summer off-peak the post-merger HHI was 3,963, an increase in HHI of 529 points; for winter off-peak, the post-merger HHI was 2,262, an increase in HHI of 299 points. Applicants' largest market share in these three periods was 62.4 percent, during the summer off-peak season/load period. *Id.* n.305.

[26] In the 10 percent price increase sensitivity analysis, the additional failures occurred in the summer peak (post-merger HHI of 2,866, an increase in HHI of 144 points) and winter peak seasons/load periods (post-merger HHI of 1,202, an increase in HHI of 112 points). Applicants' market shares in these two periods were 52.4 percent and 32 percent, respectively. In the 10 percent price decrease sensitivity analysis, one failure occurred in the summer off-peak period (post-merger HHI of 2,427, an increase in HHI of 400 points); the other failure occurred in the winter off-peak season/load period (post-merger HHI of 1,756, an increase in HHI of 227 points). Applicants' market shares in these two seasons/load periods were 47.8 percent and 40.0 percent, respectively. *Id.* n.306-307.

[27] *Id.* P 132.

[28] These additional failures were in the summer peak (post-merger HHI of 1,445, an increase in HHI of 715 points) and summer super-peak 2 seasons/load periods

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16. Based on these results, the Commission concluded that the market power screen failures in the Duke Energy Carolinas Balancing Authority Area were systematic. The Commission explained that the market power screen failures were present both in summer and winter, in multiple seasons/load periods of summer and winter, and in all three price scenarios (i.e., the base case and the 10 percent price increase and decrease sensitivities). The Commission noted that Applicants failed at least one season/load period in each price scenario.[29] With respect to the screen failures in the Progress Energy Carolinas-East Balancing Authority Area, the Commission observed that some of the HHI changes were multiple times greater than even HHI changes that are "presumed likely to create or enhance market power."[30]

b. Request for Rehearing

17. In their request for rehearing of the September 2011 Merger Order, Applicants fault the Commission for relying on the results of both the Delivered Price Test base case and price sensitivity scenarios to evaluate whether the Merger would result in systematic screen violations. Applicants assert that the Commission gave the same weight to the price sensitivities as it did to the Delivered Price Test base case scenario; that it failed to acknowledge that in doing so it was deviating from past precedent; and that it did not support this new approach with any explanation.[31] Applicants complain that the Commission also required them to implement market power mitigation to eliminate not only the market power screen failures resulting from the base case scenario of the Delivered Price Test, but also to eliminate the market power screen failures resulting from the price sensitivities. Applicants assert that the Commission failed to acknowledge that, in doing so, it was deviating from past precedent, and did not support this new approach with any explanation. Applicants conclude that the Commission's findings violate fundamental principles of administrative law.

(post-merger HHI of 1,117, an increase in HHI of 471 points). Applicants' market shares in these two seasons/load periods were 35.3 percent and 31.1 percent, respectively. *Id.* n.309.

[29] *Id.* P 134.

[30] *Id.* P 137.

[31] Request for Rehearing of Duke Energy Corporation and Progress Energy, Inc. at 5, Docket No. EC11-60-000 (Oct. 31, 2011) (Applicants Request for Rehearing of the September 2011 Merger Order).

18. According to Applicants, the Commission's use of their market power screen failures in the price sensitivity scenarios requires consideration of whether those price sensitivities "provide valid information about the markets and the effects of the merger being evaluated."[32] Applicants argue that the Commission's reliance on the price sensitivities is based on the false premise that market prices will increase or decrease while all other factors remain the same. Applicants assert that it is unreasonable and inappropriate to adjust market prices without also making appropriate adjustments to the assumed generation dispatch costs and/or loads. Applicants contend that failing to make corresponding adjustments to the dispatch costs of the generation that might be available at the higher prices and/or to the loads served at those prices results in an apples-to-oranges comparison that overstates the amount of capacity that is both available and economic at those market prices.

19. Finally, Applicants claim that by requiring the use of market prices from Electric Quarterly Reports (which include a profit margin above the incremental cost of generating the electricity sold) without providing for a corresponding adjustment to generation dispatch costs (which do not include any profit margin component), the Commission unreasonably relied on an invalid comparison that overstates the amount of capacity that would be economic at the assumed market price.[33] Applicants state that this approach leads to unrealistic results and accounts for the market power screen failures that result from using Electric Quarterly Report market price data. According to Applicants, a 10 percent price increase sensitivity analysis based on this approach further skews the Delivered Price Test results and further inflates Applicants' Available Economic Capacity.[34]

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[32] *Id.* at 6.

[33] *Id.* at 7.

[34] The Delivered Price Test takes into account applicants' and third-party suppliers' "Economic Capacity," i.e. the amount of capacity that could compete in the relevant market given market prices, running costs, and transmission availability, and "Available Economic Capacity," which is based on the same factors as Economic Capacity but accounts for native load obligations and adjusts transmission availability accordingly. September 2011 Merger Order, 136 FERC ¶ 61,245 at n.66. The Commission has stated that Available Economic Capacity is more appropriate for markets where there is no retail competition and no indication that retail competition

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c. Commission Determination

20. We deny Applicants' request for rehearing on these issues.[35] First, the Commission has, on previous occasions, highlighted the importance of sensitivity analyses and demonstrated its intent that they play a role in evaluating transactions under section 203. In Order No. 642, the Commission stated that: "[g]iven the importance of prices to the outcome of market definition, we will require applicants to perform sensitivity analysis of alternative prices on the predicted competitive effects. This provides us with an additional measure of confidence and assurance that results are reliable."[36] Consistent with the Merger Policy Statement, the Commission's regulations require applicants to provide sensitivity analyses to show that the results of their Delivered Price Tests do not vary significantly in response to variations in price.[37] The Commission has explained that a sensitivity analysis "is a standard statistical procedure designed to test whether the results of the model change significantly due to small changes in key parameters of the model."[38] In addition, the Commission has faulted applicants for failing to provide adequate sensitivity analyses with their Delivered Price Tests, noting that failing to provide such analyses constitutes non-compliance with the

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will be implemented in the near future. *See, e.g.*, *Great Plains Energy, Inc.*, 121 FERC ¶ 61,069, at P 34 & n.44 (2007), *reh'g denied*, 122 FERC ¶ 61,177 (2008); *Nat'l Grid, plc.*, 117 FERC ¶ 61,080, at PP 27-28 (2006), *reh'g denied*, 122 FERC ¶ 61,096 (2008); and *Nev. Power Co.*, 113 FERC ¶ 61,265, at PP 15, 18 (2005).

[35] We note that Applicants characterized their pleading as "a protective rehearing request" filed "in order to preserve their rights." Applicants Request for Rehearing of September 2011 Merger Order at 4. Applicants stated that in the event that the Commission approved their first market power mitigation proposal by December 15, 2011 (the proposal was pending at the time Applicants filed their rehearing request of the September 2011 Merger Order), they would withdraw their request for rehearing of the September 2011 Merger Order.

[36] *Revised Filing Requirements Under Part 33 of the Commission's Regulations*, Order No. 642, FERC Stat. & Regs. ¶ 31,111, at 31,891-31,892 (2000).

[37] 18 C.F.R. § 33.3(d)(6) (2013) ("Applicants must demonstrate that the results of the analysis do not vary significantly in response to small variations in actual and/or estimated prices.").

[38] *Duke Energy Corp.*, 113 FERC ¶ 61,297, at n.9 (2005). *See also Oklahoma Gas and Electric Co.*, 124 FERC ¶ 61,239, at n.20 (2008).

Commission's regulations that require applicants to demonstrate that the results of their analysis do not vary significantly in response to small variations in actual or estimated prices.[39] Thus, contrary to Applicants' claims, giving weight to screen failures under sensitivity runs is consistent with Commission precedent, and is not a "new approach."

21. Second, in both the market-based rates and section 203 contexts, where the Delivered Price Test plays a central role in evaluating competitive conditions in a market,[40] the Commission has concluded that sensitivity analyses can provide additional indications of market power. In *Pinnacle West*, for example, the Commission found that sensitivity analyses served as "further proof" that applicants possessed market power and affirmed the revocation of applicants' market-based rate authority for an entire season.[41] The Commission has also relied on sensitivity analyses to support findings that competition will *not* be adversely affected. For example, in *Rochester Gas & Elec. Corp.*,[42] the Commission noted that applicants had analyzed a proposed transaction under several scenarios and that only one screen failure in an off-peak period occurred under one sensitivity analysis. The Commission concluded that the screen failure did not raise competitive concerns because it occurred in a moderately concentrated market.[43] The Commission explained that it would have been more concerned with a screen failure in a highly concentrated market, "where the likelihood of harm to competition is the greatest,"[44] and that the single screen failure in one season/load period did not necessarily

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[39] *See Southern Co. Energy Marketing, Inc.*, 112 FERC ¶ 61,054, at PP 55, 59 (2005) (*Southern Co.*).

[40] *See, e.g., Southern Co.*, 112 FERC ¶ 61,054 at P 25-33 (explaining background and purpose of Delivered Price Test in section 203 and market-based rates contexts); *Pinnacle West Capital Corp.*, 120 FERC ¶ 61,153, at PP 19-26 (2007) (*Pinnacle West*) (same).

[41] *Pinnacle West*, 120 FERC ¶ 61,153 at P 38 ("Pinnacle's sensitivity analyses are further proof that Pinnacle has market power…during the summer season."). *See also Exelon Corp.*, 138 FERC ¶ 61,167, at PP 105-106 (2012) (*Exelon-Constellation*) (discussing 10 percent price increase and decrease sensitivity analyses performed by Commission staff).

[42] 107 FERC ¶ 61,180 (2004) (*Rochester Gas*).

[43] *Id.* P 12.

[44] *Id.*

demonstrate harm to competition.[45] In this case, the results of the August 29 Delivered Price Test demonstrated that Applicants failed the market power screens in the base case and price sensitivity scenarios, and that those failures were larger than market power screen failures in previous cases. As in *Pinnacle West*, the additional market power screen failures in the price sensitivity scenarios supported the conclusion that the Merger would likely result in adverse competitive impacts.

22. Third, the Commission disagrees with Applicants' claim that it was inappropriate for the Commission to require Applicants to implement market power mitigation measures to eliminate not only the market power screen failures resulting from the base case of the Delivered Price Test, but also to eliminate the market power screen failures resulting from the price sensitivities. Even in the base case, for example, Applicants failed the market power screens for two of the four season/load periods during the summer. Because peak periods and market prices vary from year to year and are not known until after the fact, to ensure that customers were adequately protected the Commission required Applicants to establish mitigation during entire seasons rather than attempting to target specific seasons/load periods and potentially leaving customers vulnerable.[46]

23. Fourth, the Commission also disagrees with Applicants' assertion that the Commission must make corresponding adjustment to loads and/or generation dispatch costs when considering sensitivity analyses. While applicants under section 203 are welcome to provide additional sensitivity analyses which adjust other factors that applicants believe are appropriate, the relevant Commission regulations require applicants to provide, at least, sensitivity analyses that test how responsive the results of a Delivered Price Test are to one variable: price.[47]

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[45] *Id.*

[46] *See Pinnacle West*, 120 FERC ¶ 61,153 at n.35 (affirming revocation of market-based rate authority for the entire summer season rather than during specific peak periods).

[47] 18 C.F.R. § 33.3(d)(6) (2013).

2. Whether the Commission Properly Applied the Internal Interface Rule.

a. The September 2011 and June 2012 Merger Orders

24. In the September 2011 and June 2012 Merger Orders, the Commission accepted Delivered Price Tests that allocated transmission capability across the transmission interfaces between the Duke Energy Carolinas and Progress Energy Carolinas-East Balancing Authority Areas to third-party suppliers. City of New Bern protested the Delivered Price Tests submitted by Applicants with the Merger Application and the March 2012 Compliance Filing on the basis that the transmission interfaces between the Duke Energy Carolinas and the Progress Energy Carolinas-East Balancing Authority Areas would become internal to the merged firm after the Merger.[48] City of New Bern alleged that pursuant to the Commission's regulations, specifically 18 C.F.R. §33.3(c)(4)(i)(D) (2013), referred to as the Internal Interface Rule, the transmission capability across those interfaces should have been allocated to Applicants.[49] The Internal Interface Rule states:

> If the proposed transaction would cause an interface that interconnects the transmission systems of the merging entities to become transmission facilities for which the merging entities would have a "native load" priority under their open access transmission tariff (*i.e.*, where the merging entities may reserve existing transmission capacity needed for native load growth and network transmission customer load growth reasonable forecasted within the utility's current planning horizon), all of the unreserved capability of the interface must be allocated to the merging entities for purposes of the horizontal Competitive Analysis Screen, unless the applicant demonstrates one of the following:
>
> (1) The merging entities would not have adequate economic capacity to fully use such unreserved transmission capability;
>
> (2) The merging entities have committed a portion of the interface capability to third parties; or

[48] City of New Bern also raised this issue in response to the Motion to Supplement.

[49] Allocating the transmission capability of these interfaces to Applicants would have increased Applicants' market share and increased market concentration.

(3) Suppliers other than the merging entities have purchased a portion of the interface capability.

b. Requests for Rehearing

25. In its requests for rehearing of the September 2011 and June 2012 Merger Orders, City of New Bern alleges that the Commission departed without any explanation from the Internal Interface Rule. Specifically, City of New Bern claims that the orders departed from established Commission precedent by accepting market concentration analyses where Applicants prorated among various third-party suppliers interface capacity that would become internal to the merged company.[50] City of New Bern argues that accepting Applicants' approach "significantly understates the level of market concentration increase resulting from the proposed merger."[51] City of New Bern claims that of the three conditions in the Internal Interface Rule that would "excuse" the attribution of the internal interface capacity to Applicants, only the second, which considers whether applicants have committed a portion of transmission capability to third parties, has any relevance, and even then only to the extent of the 25 MW transmission capacity set-aside of the Stub Mitigation.[52]

c. Commission Determination

26. We deny City of New Bern's requests for rehearing of the September 2011 and June 2012 Merger Orders on these issues. As discussed below, the evidence in the record supports a finding that the transmission interfaces between the Duke Energy Carolinas and Progress Energy Carolinas transmission systems will not become internal to the merged company.

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[50] *See, e.g.* Request of the Cities of New Bern and Rocky Mount, North Carolina for Rehearing of Order on Disposition of Facilities and Merger at 7 (citing *Western Resources, Inc.*, 86 FERC ¶ 61,312 (1999); *Allegheny Energy*, 84 FERC ¶ 61,223 (1998); *Ohio Edison, Co.*, 80 FERC ¶ 61,039 (1997)), Docket Nos. EC11-60-000, ER11-3306-000, and ER11-3307-000 (not consolidated) (Oct. 31, 2011) (City of New Bern Request for Rehearing of September 2011 Merger Order).

[51] *Id.* at 8.

[52] Request of the Cities of New Bern and Rocky Mount, North Carolina for Rehearing of Order Accepting Revised Compliance Filing, as Modified, and Power Sales Agreements at 9, Docket No. EC11-60-005 (Jul. 9, 2012) (City of New Bern Request for Rehearing of June 2012 Merger Order).

27. In their June 2011 answer, Applicants, quoting the Internal Interface Rule, claim that the Merger would not "'cause an interface that connects [*sic*] the transmission systems of the merging entities to become transmission facilities for which the merging entities would have a 'native load' priority under their open access transmission tariff.'"[53] Rather, Applicants clarified that "the ability of either company to reserve existing capacity on those interfaces for native load growth or load growth of network transmission customers [would] not change, nor [would] the procedures followed by the Applicants to reserve capacity on the interfaces."[54] Applicants indicated that the transmission interfaces between the Duke Energy Carolinas and Progress Energy Carolinas transmission systems would be maintained as external interfaces to each other's Balancing Authority Areas with "no change in their access rights or the application of the [Open Access Transmission Tariff (OATT)] procedures."[55] In addition, Applicants specified that their wholesale requirements customers, who are network transmission customers, would continue to have access to the interface capacity under the same terms and conditions as Applicants. Applicants stated that the Merger would not change Applicants' priority to the interfaces; they would have no greater priority to the transmission interface capacity than any of their wholesale customers or any third-party customers using the same level of transmission service.[56]

28. Applicants' explanations regarding how the interfaces would be operated if the Merger was consummated effectively addressed any concerns the Commission may have had related to the treatment of the transmission interfaces between Duke Energy Carolinas and Progress Energy Carolinas, and we expect Applicants to operate, and continue to operate, the interfaces as they have represented. Accordingly, we deny City of New Bern's request for rehearing on these issues.

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[53] Answer of Duke Energy Corporation and Progress Energy, Inc. at 37 (quoting the Internal Interface Rule, 18 C.F.R. § 33.3(c)(4)(i)(D)), Docket No. EC11-60-000, ER11-3306-000, and ER11-3307-000 (not consolidated) (Jun. 17, 2011) (Applicants June 2011 Answer).

[54] *Id.* at 37.

[55] *Id.*

[56] *Id.* Applicants also added that both Duke Energy Carolinas and Progress Energy Carolinas would maintain separate transmission systems, such that applicable reliability requirements would be unchanged. *Id.* at 36.

3. Whether the Commission Erred by Rejecting City of New Bern's Criticisms of Applicants' Delivered Price Tests.

a. The September 2011 Merger Order

29. In the September 2011 Merger Order, the Commission relied on the August 29 Delivered Price Test to find that Applicants failed the market power screens in certain seasons/load periods. City of New of Bern protested nearly all aspects of the August 29 Delivered Price Test and Applicants' other studies, asserting that the Commission should rely on City of New Bern's evidence and other arguments rather than Applicants' analyses. Although City of New Bern agreed with the Commission that Applicants should base their Delivered Price Test on actual market prices, it argued that Applicants' Electric Quarterly Report prices understated market price. City of New Bern also claimed that the Merger Application Delivered Price Test assumed, unrealistically, that a disproportionate amount of remote generation could reach the Carolina Balancing Authority Areas, thereby artificially diluting Applicants' post-merger market share.[57] In addition, City of New Bern asserted that Applicants failed to support their claims regarding the transmission data used to perform those tests.

30. In the September 2011 order, the Commission disagreed with City of New Bern's criticisms of the August 29 Delivered Price Test and Applicants' other studies. With respect to City of New Bern's complaints regarding the supplier data Applicants used in their studies, the Commission explained that most of the supply in Applicants' analysis was within one wheel of the relevant markets. The Commission also provided an in-depth analysis of possible suppliers in the September 2011 Merger Order. The Commission rejected City of New Bern's criticism that Applicants modeled certain generation as available when it was actually committed. The Commission explained that although City of New Bern correctly identified a few newly-committed generation units that Applicants had improperly counted as uncommitted, the identification of those units did not affect the results of the study because the amount of Available Economic Capacity assumed to be imported would not change. The Commission found that the record showed that there was substantially more Available Economic Capacity located outside of the Carolina Balancing Authority Areas than there was transmission import capability into the Carolina Balancing Authority Areas. Finally, the Commission also declined to rely on City of New Bern's alternative Delivered Price Test. The

[57] The Commission relied on the Merger Application Delivered Price Test for its top 10 supplier analysis because a top 10 supplier analysis based on Electric Quarterly Reports was not in the record. September 2011 Merger Order, 136 FERC ¶ 61,245 at n.323.

Commission found, among other things, that City of New Bern's Delivered Price Test mixed national data for all sales in all markets by Applicants (by using FERC Form No. 1 data), and local data for the three Carolina Balancing Authority Areas (by also using data from Electric Quarterly Reports) to compile the price series it relied on in its Delivered Price Test.[58]

b. Request for Rehearing

31. In its request for rehearing of the September 2011 Merger Order, City of New Bern argues that the Commission failed to address the lack of data supporting or explaining Applicants' claims regarding Simultaneous Transmission Import Limits, transmission constraints, loop flows, and other transmission system conditions. City of New Bern complains that the transmission load flow simulations upon which Applicants' economic consultant relied were unexplained by any narrative, engineering testimony or studies,[59] and that the Commission did not respond properly to the issues it raised with respect to Applicants' transmission systems.[60] City of New Bern asserts that the record in this proceeding provides no basis for the September 2011 Merger Order to accept Applicants' contentions regarding the operating characteristics, constraints, import limitations, and other aspects of their transmission systems.[61]

32. City of New Bern argues further that the Commission reached conclusions that indicate a misunderstanding of the significance of the evidence it submitted,[62] specifically, evidence demonstrating that Applicants' Electric Quarterly Report data "appeared inaccurate"[63] and that the sales and price data presented by Applicants and relied upon by the Commission contained errors.[64] City of New Bern also points to sales included in Applicants' FERC Form No. 1 data that were omitted from Applicants'

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[58] *Id.* n.320.

[59] City of New Bern Request for Rehearing of September 2011 Merger Order at 10.

[60] *Id.*

[61] *Id.*

[62] *Id.* at 11.

[63] *Id.*

[64] *Id.* at 12.

Electric Quarterly Report data, and discrepancies in reported volumes between the two. According to City of New Bern, the Commission overlooked these discrepancies and their impact on the reliability of the price and volume data reported by Applicants.

33. City of New Bern also criticizes the Commission's analysis of available suppliers in the September 2011 Merger Order, asserting that there was no evidence regarding which of the suppliers were actually available and not committed to native load requirements in the originating markets. City of New Bern claims that Applicants' response to this argument, essentially that City of New Bern did not prove that all of the potential supply sources were unavailable, was adopted in the September 2011 Merger Order. City of New Bern contends that such a finding borders on inverting the burden of proof since it implies that after having shown that Applicants' model used flawed data and produced flawed results, City of New Bern was then required to show that every supplier in Applicants' model was unavailable. City of New Bern states that it was incumbent upon Applicants to produce "appropriately verified data" in response to its challenge.[65]

c. Commission Determination

34. We deny City of New Bern's request for rehearing on these issues. In its request for rehearing of the September 2011 Merger Order, City of New Bern refers to questions that it raised about whether Applicants' transmission studies took into account certain transmission constraints identified in a Joint Dispatch Study Applicants submitted with their merger application before the North Carolina Utilities Commission (North Carolina Commission), and possible loop flows from the PJM Interconnection. In their June 17, 2011 answer, however, Applicants explained that the Simultaneous Transmission Import Limit study that they relied upon in performing the August 29 Delivered Price Test was performed in accordance with the requirements the Commission established for studies performed in the Southeast region in connection with market-based rate studies.[66] As Applicants explained, consistent with those requirements, the Simultaneous Transmission Import Limit studies implicitly took into account the loop flows from the PJM Interconnection referred to by City of New Bern. Likewise, Applicants stated that their

[65] *Id.* at 14.

[66] *See Carolina Power & Light Co.*, 128 FERC ¶ 61,039 (2009). Applicants did note that studies performed for merger analyses deviate from some aspects of the Commission's methodology inasmuch as market-based rate analyses are historical in perspective and merger analyses are forward-looking. Applicants June 2011 Answer at n.27.

analysis took into account the transmission constraints referred to in the Joint Dispatch Study cited by City of New Bern. City of New Bern did not provide a basis for the Commission to question Applicants' explanation, nor did it submit evidence on this point. Accordingly, the Commission denies rehearing on this issue.

35. We also reject City of New Bern's arguments regarding the data that Applicants submitted. The Commission considered the evidence City of New Bern offered, but ultimately accepted the August 29 Delivered Price Test. As the Commission explained in the September 2011 Merger Order, City of New Bern incorrectly mixed FERC Form No. 1 data and Electric Quarterly Report data. FERC Form No. 1 data and Electric Quarterly Report data provide price information in different ways. First, FERC Form No. 1 data is presented on an annualized basis, and is not broken down into multiple load conditions, as required under the Commission's regulations to perform the Delivered Price Test.[67] Second, FERC Form No. 1 data reports transactions for all of Applicants' sales throughout the United States, not only for the Carolina Balancing Authority Areas, whereas the Electric Quarterly Report data Applicants used to perform their Delivered Price Test was specifically for the Carolina Balancing Authority Areas. Third, since FERC Form No. 1 data includes long-term firm sales, the average price could be dramatically altered, leading to misleading results in the Delivered Price Test, which models markets based on prices for sales of short-term energy products.

36. We note that in the September 2011 Merger Order, the Commission found that the record showed that there was substantially more Available Economic Capacity located outside of the Carolina Balancing Authority Areas than there was transmission import capacity into those areas. While City of New Bern did show that some of the generation Applicants categorized as uncommitted was actually committed outside of the Carolina Balancing Authority Areas, the amount of generation that could be imported into the Carolinas Balancing Authority Areas was limited by the Simultaneous Transmission Import Limit rather than the amount of Available Economic Capacity, as the amount of Available Economic Capacity was far greater than the Simultaneous Transmission Import Limit. Thus, since the Simultaneous Transmission Import Limit was the limiting factor and the amount of additional uncommitted capacity available outside the Carolina Balancing Authority Areas dwarfed that limit, City of New Bern's evidence was of limited relevance and did not change the Delivered Price Test results. City of New Bern did not persuade the Commission that the discrepancies in Applicants' data were of such magnitude that the Simultaneous Transmission Import Limit would still not be the limiting factor for imports of Available Economic Capacity into the Carolinas Balancing Authority Areas. Nor did City of New Bern show that eliminating the supply from the

[67] *See* 18 C.F.R. § 33.3(c)(1) (2013).

external committed units would materially change the market concentration. Accordingly, the Commission denies City of New Bern's request for rehearing on this issue.

4. Whether the Commission Erred in Dismissing City of Orangeburg's Allegations Regarding the Effects of the Merger.

a. The September 2011 Merger Order

37. In the September 2011 Merger Order, the Commission addressed arguments advanced by the City of Orangeburg, South Carolina (City of Orangeburg) that the Merger would adversely affect competition, rates, and regulation. The issues raised by City of Orangeburg related to an existing state regulatory framework established by the North Carolina Commission, in particular an order issued by the North Carolina Commission that City of Orangeburg alleged interfered with wholesale energy markets and the Commission's jurisdiction (North Carolina Commission Order).[68]

38. The Commission concluded that City of Orangeburg did not show that the alleged harms to competition, rates, and regulation stemmed from the Merger. The Commission explained that it conditions section 203 authorizations only when needed to address specific, transaction-related harm,[69] and that the harms alleged by City of Orangeburg did not result from the Merger. With respect to the effects of the Merger on competition, the Commission explained that rather than showing that the Merger would negatively affect competition, City of Orangeburg based its arguments on state regulatory policies. With respect to the effect of the Merger on rates, the Commission explained that the harms alleged by City of Orangeburg also stemmed from existing regulatory policies, which would continue in effect irrespective of whether the Merger was approved, and the Joint

[68] In the North Carolina Commission Order, the North Carolina Commission concluded: (1) that Duke Energy Carolinas could not treat the retail native load of the City of Orangeburg as its own retail native load; and (2) that for retail ratemaking purposes, it would allocate the costs incurred by Duke Energy Carolinas to make sales under a 2008 wholesale power purchase agreement with City of Orangeburg at incremental, rather than system average, costs. City of Orangeburg filed a petition for declaratory order to invalidate the North Carolina Commission Order with the Commission in Docket No. EL09-63-000. That matter is pending.

[69] September 2011 Merger Order, 136 FERC ¶ 61,245 at P 147 (citing *Entergy Gulf States, Inc.*, 121 FERC ¶ 61,182, at P 71 (2007), *Duke Energy Corp.*, 113 FERC ¶ 61,297 (2005)).

Dispatch Agreement, upon which approval of the Merger was not predicated.[70] The Commission made the same finding with respect to City of Orangeburg's arguments as to the effect of the Merger on regulation.[71]

39. City of Orangeburg premised its protest of the March 2012 Compliance Filing on the same allegations. In the June 2012 Merger Order, the Commission rejected City of Orangeburg's arguments pertaining to the state regulatory conditions for the same reasons as it did in the September 2011 Merger Order: the alleged harms were based on state regulatory policies that were in place and would continue in effect regardless of whether the Merger was consummated.[72]

b. Requests for Rehearing

40. In its request for rehearing of the September 2011 Merger Order, City of Orangeburg challenges the Commission's findings regarding the state regulatory conditions and the Joint Dispatch Agreement. In addition to repeating many of the same arguments it raised in prior pleadings, City of Orangeburg argues that the harms it complains of will not stem from the existing state regulatory conditions, but rather from the new state regulatory conditions that, while based on the existing state regulatory conditions, constitute a "new legal document that will replace the existing state regulatory conditions"[73] and apply to Applicants.[74] City of Orangeburg also argues that the Commission improperly refused to consider the impacts of the Joint Dispatch Agreement;[75] that the harms it asserted would arise from the Merger were improperly

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[70] *Id.* P 171. The Joint Dispatch Agreement was filed concurrently with the Merger Application. Pursuant to that agreement, Duke Energy Carolinas and Progress Energy Carolinas were to "jointly dispatch their generation fleets in order to operate their systems more economically for the benefit of their customers." Merger Application at 1. The Joint Dispatch Agreement was accepted by the Commission. *See Duke Energy Corp.*, 139 FERC ¶ 61,193 (2012).

[71] September 2011 Merger Order, 136 FERC ¶ 61,245 at P 184.

[72] June 2012 Merger Order, 139 FERC ¶ 61,194 at P 110.

[73] Request for Rehearing of the City of Orangeburg, South Carolina at 12 (emphasis removed), Docket No. EC11-60-000 (Oct. 31, 2011) (City of Orangeburg Request for Rehearing of September 2011 Merger Order).

[74] *See id.* at 7-15.

[75] *Id.* at 15-19

disregarded by the Commission;[76] and that the Commission committed reversible error in ignoring City of Orangeburg's request for relief under section 205(a) of the Public Utilities Regulatory Policy Act (PURPA).[77]

41. In its request for rehearing of the June 2012 Merger Order, City of Orangeburg claims that the Commission's acceptance of the March 2012 Compliance Filing is harmful to it because, but for the June 2012 Merger Order, there would be no merger, and but for the Merger, there would be no Joint Dispatch Agreement, which creates a new low-cost power resource that will be available to its competitors. City of Orangeburg urges the Commission to rule that it is entitled to wholesale native load status under the Joint Dispatch Agreement, and that any North Carolina state regulatory conditions to the contrary are unlawful.[78]

c. Commission Determination

42. The Commission denies City of Orangeburg's requests for rehearing of the September 2011 and June 2012 Merger Orders. Although the Commission considered City of Orangeburg's claims regarding the Merger, the Commission concluded in those orders that the harms alleged by the City of Orangeburg were not the result of the Merger. As the Commission explained in the September 2011 Merger Order, the Commission conditions section 203 authorizations only when necessary to address specific, transaction-related harms. The Commission considered and evaluated City of Orangeburg's claims that the Merger would result in specific harms, but ultimately

[76] *Id.* at 19-23. The harms alleged by City of Orangeburg include an adverse effect on the Commission's jurisdiction, *id.* 23-32; an adverse effect on rates and undue discrimination, *id.* at 32-38; and an adverse effect on competition, *id.* at 38-42.

[77] *Id.* at 42-43. City of Orangeburg had argued that the North Carolina Commission's regulatory policies interfered with the "promotion of economic utilization" of the merged firms' resources and that the Commission should condition the Merger so as to override the North Carolina Commission Order, pursuant to section 205(a) of PURPA, 16 U.S.C. § 824a-1(a) (2012). *See, e.g.*, Motion to Intervene and Protest of the City of Orangeburg, South Carolina, Docket No. EC11-60-000, ER11-3306-000, and ER11-3307-000 (not consolidated) (June 3, 2011).

[78] Request for Rehearing of the City of Orangeburg, South Carolina at 12, Docket No. EC11-60-004, ER12-1339-000, ER12-1340-00, ER12-1341-000, ER12-1342-000 (not consolidated) (July 9, 2012) (City of Orangeburg Request for Rehearing of June 2012 Merger Order).

concluded that the alleged harms, even if they did result, were not due to the Merger. City of Orangeburg failed to support its arguments because it never pointed to specific adverse effects related to the Merger. Rather, City of Orangeburg focused on state regulatory conditions and the Joint Dispatch Agreement. We also decline to grant City of Orangeburg's request for relief under section 205(a) of PURPA for the same reasons: City of Orangeburg's arguments on this point are premised on the alleged negative effects of North Carolina Commission's regulatory actions, rather than the Merger. Accordingly, we deny City of Orangeburg's requests for rehearing on these issues.

5. Whether the Commission Erred by not Considering the Impacts of the Merger on the Peninsular Florida Market.

a. The September 2011 and June 2012 Merger Orders

43. In the September 2011 Merger Order, the Commission denied the Florida Municipal Power Agency's request that the Commission require Applicants to submit a Delivered Price Test for Peninsular Florida, and rejected arguments that the Commission was required to consider Peninsular Florida in evaluating the Merger. The Commission drew this conclusion based on the Merger Policy Statement, which states: "it will not be necessary for the merger applicants to perform the screen analysis or file the data needed for the screen analysis in cases where the merging firms do not have facilities or sell relevant products in common geographic markets."[79] The Merger Policy Statement explains that in these cases, "the proposed merger will not have an adverse competitive impact (*i.e.*, there can be no increase in the applicants' market power unless they are selling relevant products in the same geographic markets) so there is no need for a detailed data analysis."[80] Based on the evidence in the record, the Commission concluded that Applicants demonstrated that they did not conduct business in the same

[79] *Id.* P 150 (citing and quoting Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,136).

[80] *Id.*

geographic market in Florida; that Duke Energy did not own or control any generation capacity in Florida; and that Duke Energy had not sold or delivered any energy into Florida in the last three years.[81] The Commission also rejected a market power study submitted by the Florida Municipal Power Agency, finding that it was flawed.[82]

44. In the June 2012 Merger Order, the Commission noted that in its protest of the March 2012 Compliance Filing, the Florida Municipal Power Agency reiterated the arguments it had made previously in its request for rehearing of the September 2011 Merger Order and in its original protest of the Merger Application. The Commission concluded that since the March 2012 Compliance Filing related entirely to the Commission's competitive concerns with regard to the Carolina markets, it would address the Florida Municipal Power Agency's arguments on rehearing of the September 2011 Merger Order.

b. Requests for Rehearing

45. The Florida Municipal Power Agency requests rehearing of both the September 2011 and the June 2012 Merger Orders, repeating arguments that it made in its protests and challenging virtually every aspect of the Commission's orders regarding the Merger as they relate to Peninsular Florida. In its request for rehearing of the September 2011 Merger Order, the Florida Municipal Power Agency argues that the Commission cannot make the required finding that the Merger is "consistent with the public interest" under section 203 because it neither ordered Applicants to study the impacts of the Merger on Peninsular Florida nor made an independent effort to do so.[83] The Florida Municipal

[81] *Id.* P 151.

[82] *Id.* P 152. The Commission, for example, found that although the Florida Municipal Power Agency purported to measure Available Economic Capacity in Peninsular Florida and in the Progress Energy Florida Balancing Authority Area, the Florida Municipal Power Agency only calculated the uncommitted generation capacity of Florida's utilities for two periods, peak and off-peak. The Commission also noted that since market prices were not considered in the Florida Municipal Power Agency's analysis, it was impossible to know how much of the uncommitted capacity identified in the study could be sold economically in the Progress Energy Florida Balancing Authority Area. *See id*.

[83] FMPA Request for Rehearing of the Commission's Order on Disposition of Jurisdictional Facilities and Merger Conditionally Approving a Duke Energy – Progress Energy Merger at 10-15, Docket No. EC11-60-002 (Oct. 31, 2011) (FMPA Request for Rehearing of September 2011 Merger Order).

Power Agency also argues that the Commission ignored that the merged company would have substantial Florida market power, and ignored the "compelling evidence" it presented showing the likelihood of future sales by Duke Energy in the Florida market.[84] The Florida Municipal Power Agency faults the Commission for denying requests for a hearing on these and other disputed material facts,[85] and contends that the Commission applied erroneous standards when it rejected arguments regarding the need for a market power study of Peninsular Florida.[86]

46. The Florida Municipal Power Agency further challenges, as arbitrary and capricious, the Commission's finding that Duke Energy does not make sales into or compete in Peninsular Florida; asserts that the Commission failed to adequately consider the effects of existing market power in Peninsular Florida; and claims that the Commission should have ordered a hearing to determine whether Duke Energy makes sales into Florida.[87] With respect to the latter point, the Florida Municipal Power Agency argues that the Commission should not have accepted Applicants' statements regarding certain sales by Duke Energy that the Florida Municipal Power Agency claims were made into Peninsular Florida, and challenges the Commission's finding that even if those sales were made into Peninsular Florida, those sales would have been a "*de minimis* 'percent of total energy consumed in Florida in 2010.'"[88] In addition, the Florida Municipal Power Agency claims that the Commission must consider Applicants' filings in previous merger proceedings.[89]

47. The Florida Municipal Power Agency disputes the Commission's criticisms of the results of its market power study, asserting that its study establishes that Applicants would fail the market power screens for Peninsular Florida in some seasons; that HHIs would increase greatly; and that the study demonstrates that Duke Energy would have the tie capacity, resources, and motivation to sell into the Peninsular Florida markets.[90] The

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[84] *Id.* at 13.

[85] *Id.* at n. 11.

[86] *Id.* at 15-18 (citing 18 C.F.R. § 33.3(a)(2)(i)-(ii)).

[87] *Id.* at 19-28.

[88] *Id.* at 21.

[89] *Id.* at 25 (citing *Duke Energy Corp.*, 113 FERC ¶ 61,297; *CP&L Holdings, Inc.*, 92 FERC ¶ 61,023, *reh'g denied*, 94 FERC ¶ 61,096 (2001)).

[90] *Id.* at 29-36.

Florida Municipal Power Agency further argues that the Commission ignores the potential for Applicants to possess vertical market power in Florida.[91] Finally, the Florida Municipal Power Agency asserts that the Commission erred in failing to implement the merger conditions it proposed.[92]

48. In its request for rehearing of the June 2012 Merger Order, the Florida Municipal Power Agency argues that it was arbitrary and capricious for the Commission to approve the Merger without considering the Florida market power issues it presented in its protest of the March 2012 Compliance Filing and its request for rehearing of the September 2011 Merger Order. The Florida Municipal Power Agency also repeats many of the same issues and specifications of error described above.[93]

c. Commission Determination

49. We deny the Florida Municipal Power Agency's requests for rehearing of the September 2011 and June 2012 Merger Orders. As the Commission explained in the September 2011 Merger Order, the Commission's regulations and precedent establish that a Competitive Analysis Screen is not necessary where applicants show that the merging entities do not currently conduct business in the same geographic markets or that the extent of the business transactions in the same geographic market is *de minimis*.[94]

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[91] The Florida Municipal Power Agency asserts that Applicants will "be advantaged through transmission and generation control and through preferred Florida interface use rights." *Id.* at 36.

[92] *Id.* at 38-42. The Florida Municipal Power Agency suggested, for example, that the Commission require Duke Energy to expand interface capacity and improve the Florida transmission system.

[93] FMPA Request for Rehearing of the Commission's Revised Compliance filing Order at 7-9, Docket No. EC11-60-005 (Jul. 9, 2012) (FMPA Request for Rehearing of June 2012 Merger Order).

[94] *See* 18 C.F.R. § 33.3(a)(2)(i) (2013). *See, e.g.*, *Duke Energy Corp.*, 113 FERC ¶ 61,297, at P 83 (2005) ("The Duke market is highly concentrated, with Duke being the dominant firm in that market, but the proposed merger does not eliminate a competitor in that market. Cinergy does not have any significant presence in the Duke market, so the combination of the two cannot reduce competition.").

50. In this proceeding, Applicants demonstrated that they do not both conduct business in Peninsular Florida by showing that Duke Energy does not own any generation in Florida and makes no sales in that state.[95] The Florida Municipal Power Agency did not rebut this evidence. The Florida Municipal Power Agency's reliance on certain sales it claims were made in Peninsular Florida by Duke Energy Carolinas to Progress Energy Florida in 2010 is misplaced. As Applicants explained, those sales were not made in Peninsular Florida, but in the Progress Energy Carolinas and Southern Company markets.[96] Further, Applicants calculated that even if these sales had been made in Peninsular Florida, they would have represented only 0.006 percent of the total energy consumed in Florida in 2010, which, we agree, would constitute a *de minimis* amount of business.[97] We also confirm our finding in the September 2011 Merger Order that the Florida Municipal Power Agency's market study was flawed, and therefore unpersuasive. As we reject the fundamental underpinning of the Florida Municipal Power Agency's requests for rehearing, we will not address the numerous additional issues that it raises on rehearing.

6. Whether the Commission Erred by Rejecting the October 2011 Compliance Filing.

a. The December 2011 Merger Order

51. In the December 2011 Merger Order, the Commission rejected Applicants' first market power mitigation proposal, which was filed in the October 2011 Compliance Filing, because it did not remedy the Merger's adverse effect on competition or the market power screen failures identified in the September 2011 Merger Order. The Commission rejected the mitigation proposal, but did so without prejudice to Applicants proposing market power mitigation measures that remedied the screen failures identified in the September 2011 Merger Order.[98]

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[95] Applicants June 2011 Answer at 7. *See also* September 2011 Merger Order, 136 FERC ¶ 61,245 at P 151 (acknowledging that Applicants' attempts to build new generation in Florida have failed, and that Florida law and policy limited construction of new generation).

[96] Applicants June 2011 Answer at 7.

[97] *Id.* at 7-8.

[98] December 2011 Merger Order, 137 FERC ¶ 61,210 at P 66.

b. Request for Rehearing

52. In their request for rehearing of the December 2011 Merger Order, Applicants explain that they filed their request "in order to protect their rights."[99] Applicants stated that notwithstanding the issues they raised in their request for rehearing, they were in the process of "attempting to develop an alternative proposal that addresses the concerns raised by the Commission" in the December 2011 Merger Order.

c. Commission Determination

53. We find that Applicants' request for rehearing of the December 2011 Merger Order is moot: the October 2011 Compliance Filing has been superseded and overtaken by events. As Applicants allude to in their request for rehearing of the December 2011 Merger Order, they were, at the time, crafting a new mitigation proposal to address the Commission's concerns in the September 2011 Merger Order. Applicants provided that mitigation proposal in the March 2012 Compliance Filing, and the Commission accepted it, subject to certain conditions to which Applicants did not object.[100] Given that the October 2011 Compliance Filing is no longer at issue, Applicants are no longer aggrieved by the issues they raised on rehearing of the December 2011 Merger Order. Aggrievement is a necessary condition in order to have standing to seek rehearing, pursuant to FPA section 313.[101] Accordingly, we dismiss Applicants' request for rehearing of the December 2011 Merger Order as moot.

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[99] Request for Rehearing of Duke Energy Corporation and Progress Energy, Inc. at 1, Docket No. EC11-60-000 (Jan. 13, 2012) (Applicants Request for Rehearing of the December 2011 Merger Order).

[100] Applicants did not request rehearing of the June 2012 Merger Order.

[101] 16 U.S.C. § 825l (2012). Section 313(a) of the FPA states that only parties who are aggrieved by an order issued by the Commission may request rehearing. In the current circumstances, addressing the issues Applicants raise in their request for rehearing of the December 2011 Merger Order would be akin to issuing a declaratory order on a purely hypothetical matter. *See TC Ravenswood, LLC*, 140 FERC ¶ 61,214 (2012).

7. Whether the Commission Erred by Relying on Post-Merger Monitoring to Find the Merger Consistent with the Public Interest.

a. The June 2012 Merger Order

54. In the June 2012 Merger Order, the Commission accepted the March 2012 Compliance Filing subject to certain revisions, including additional reporting requirements for the Independent Monitor related to both the interim and permanent market power mitigation.[102] Specifically, with respect to the interim market power mitigation, the Commission required the Independent Monitor to monitor the purchases under the Power Sales Agreements and, among other things, to report to the Commission if the actual purchases under the agreements were less than the quantities offered by Applicants. With respect to the permanent market power mitigation, the Commission required that the Independent Monitor provide periodic reports on the status of the transmission upgrades.

b. Requests for Rehearing

55. Citing the Merger Policy Statement, City of New Bern argues that the Commission's established policy on merger-related market power mitigation provides that the Commission will not rely on post-merger review.[103] City of New Bern asserts that the June 2012 Merger Order exhibits a "lack of confidence" in the effectiveness of the interim mitigation and leaves the Commission and Applicants' customers in the "inappropriate position" of having to police Applicants' compliance with the requirements of the June 2012 Merger Order.[104] City of New Bern claims that the June 2012 Merger Order represents a shift away from the Commission's established policy and toward uncertainty regarding the adequacy of market power mitigation proposals. City of Orangeburg makes similar arguments, alleging that the Commission's decision to rely on

[102] In the March 2012 Compliance Filing, Applicants proposed to establish an Independent Monitor to monitor the interim and permanent mitigation. *See* June 2012 Merger Order, 139 FERC 61,194 at P 42.

[103] City of New Bern Request for Rehearing of the June 2012 Merger Order at 17 (citing Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,121).

[104] *Id.* City of New Bern cites to the additional substantive and monitoring requirements established by the Commission in the June 2012 Merger Order as undermining the efficacy of Applicants' interim mitigation proposal. *Id.* 16.

post-merger reporting and monitoring represents an impermissible and unexplained departure from precedent.[105]

c. Commission Determination

56. We deny the requests for rehearing on this issue. As the Commission has noted, section 203(a) states that if the Commission determines that a proposed merger is consistent with the public interest, then the Commission shall approve the proposed transaction. Section 203(b) adds that the Commission may grant an application for an order under section 203 "…upon such terms and conditions as it finds necessary or appropriate to secure the maintenance of adequate service and the coordination in the public interest of facilities subject to the jurisdiction of the Commission."[106] Accordingly, it is clear that the Commission's finding that a proposed transaction is consistent with the public interest may be based, in part, on the imposition of "necessary and appropriate" conditions, which, in this case, included requiring supplemental filings to demonstrate that Applicants honored their mitigation commitments.

57. In the June 2012 Merger Order, the Commission accepted the interim and permanent mitigation proposed by Applicants and established monitoring and reporting requirements to ensure that the proposed market power mitigation was properly implemented. Rather than undermining the market power mitigation proposal, the additional requirements established by the Commission strengthened both the interim and permanent market power mitigation by providing Applicants' customers and the Commission with additional assurances that the market power mitigation would function as intended. The Commission has reviewed, and continues to review, the reports filed by the Independent Monitor regarding the Power Sales Agreements and has monitored, and continues to monitor, Applicants' progress on the transmission upgrades. Should an issue related to the interim or permanent market power mitigation arise, section 203(b) provides the Commission with the authority to issue supplemental orders where necessary and appropriate.

58. We also disagree with City of New Bern and City of Orangeburg's claims that the June 2012 Merger Order is inconsistent with the Commission precedent. The Commission has, in approving prior mergers and transactions, ordered additional post-merger reporting on occasions where market power mitigation was necessary. For

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[105] City of Orangeburg Request for Rehearing of the June 2012 Merger Order at 11.

[106] 16 U.S.C. §824b(b) (2012).

example, in *American Elec. Power Co.*,[107] the Commission authorized a merger based on applicants' commitment to join a Regional Transmission Organization, but recognized that the Merger Policy Statement requires that mitigation must be fully effective in remedying identified market power issues and in place at the time the transaction is consummated.[108] Accordingly, the Commission acknowledged the need for interim market power mitigation and further conditioned its approval of the merger on implementation of interim mitigation measures, including monitoring by an independent party, upon consummation of the merger.[109] The Commission adopted a similar approach in *Exelon-Constellation*. In that case, the Commission accepted applicants' commitments to divest generation and make sales of energy, but required applicants to appoint an independent entity to certify compliance with interim mitigation.[110] Accordingly, we deny the arguments on this issue.[111]

8. Whether the Interim Market Power Mitigation Approved by the Commission Represents an Adequate Form of Virtual Divestiture.

a. The June 2012 Merger Order

59. In the June 2012 Merger Order, the Commission approved, over various protests, the interim market power mitigation proposed by Applicants. As noted above, under the interim market power mitigation proposal, Applicants committed to sell capacity and energy pursuant to the Power Sales Agreements, and established an Independent Monitor to provide oversight of those sales and ensure Applicants' compliance with their commitments. The Commission concluded that the combination of the sales pursuant to

[107] 90 FERC ¶ 61,242 (2000).

[108] *Id.* at 61,788.

[109] *Id.* at 61,789.

[110] *Exelon-Constellation*, 138 FERC ¶ 61,167 at PP 93-94.

[111] We note that the Independent Monitor filed its final report regarding the permanent mitigation measures on May 30, 2014. According to that report, on May 13, 2014, Applicants issued a notice that the transmission expansion projects were completed. The report also states that the Stub Mitigation would go into effect on June 1, 2014. Independent Monitoring Report on Permanent Mitigation Measures for Duke Energy Corporation and Progress Energy Inc., Docket No. EC11-60-004 (filed May 30, 2014) (May 2014 Independent Monitoring Report).

the Power Sales Agreements and the Independent Monitor's oversight of those sales, as revised by the Commission in the June 2012 Merger Order, constituted effective mitigation that would be in place at the time the Merger was consummated until the completion of the transmission expansion projects the Commission accepted as permanent market power mitigation.[112]

b. Requests for Rehearing

60. City of Orangeburg challenges the Commission's approval of the interim market power mitigation proposal. First, City of Orangeburg argues that since the Power Sales Agreements are transmission contingent contracts, the buyers under those agreements could game the economics of their contracts and avoid purchasing the energy under the Power Sales Agreements when it is economically unattractive to do so.[113] City of Orangeburg alleges that Applicants conceded that the Power Sales Agreements are transmission contingent contracts when they agreed with protestors that the Power Sales Agreements confer upon the buyers under those contracts total control over the amount and timing of deliveries of energy. City of Orangeburg asserts that by disregarding buyers' financial incentive to exploit the transmission contingency under the Power Sales Agreements, the Commission ignored precepts of modern economics.[114] City of Orangeburg also notes that there was no evidence in the record, and the Commission made no finding, that the buyers under the Power Sales Agreements would be able to purchase all, or any, of the energy and sell it at a profit. City of Orangeburg concludes that because the Power Sales Agreements are buyer option contracts, there is no assurance that Applicants will divest control over their resources during the interim period.[115]

61. Second, City of Orangeburg claims that the Commission's approval of the interim market power mitigation proposal was improper because there was no evidence that the transmission service necessary to support the Power Sales Agreements would be available to the buyers under those agreements. City of Orangeburg finds inadequate the Commission's attempt to address this issue by: (a) prohibiting Applicants from using control over their transmission system to thwart sales under the Power Sales Agreement;

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[112] June 2012 Merger Order, 139 FERC ¶ 61,194 at P 97.

[113] City of Orangeburg Request for Rehearing of the June 2012 Merger Order at 5.

[114] *Id.* at 4-7.

[115] *Id.* at 8.

(b) prohibiting Applicants from having priority rights over others to repurchase the energy or capacity under the Power Sales Agreements; (c) prohibiting Applicants from entering into transactions with the buyers under the Power Sales Agreements except on a spot basis; and (d) requiring applicants to use a more liquid pricing point for the gas index price under the Power Sales Agreements.[116] City of Orangeburg also deems as ineffectual the independent monitoring requirements added by the Commission. According to City of Orangeburg, none of these measures provide certainty that transmission service would be available to support the Power Sales Agreements.

c. Commission Determination

62. We deny City of Orangeburg's request for rehearing on these issues. In the June 2012 Merger Order, the Commission concluded that the combination of the Power Sales Agreements and the Independent Monitor's oversight of those sales, as revised by the Commission, constituted effective mitigation of Applicants' market power pending completion of the transmission expansion projects. In that order, the Commission addressed several of the issues that City of Orangeburg raises again on rehearing. We reject those arguments for the same reasons.

63. As an initial matter, we disagree with City of Orangeburg's claim that, due to the transmission contingent nature of the Power Sales Agreements, the buyers under those contracts could game the economics of those agreements and thereby avoid purchasing energy under the agreements by designating a proposed sink point for which transmission service is unavailable.[117] In the June 2012 Merger Order, the Commission rejected arguments that Applicants transformed the Power Sales Agreements into transmission contingent agreements by modifying the *force majeure* clause. The Commission explained that the modified *force majeure* provision only excused buyers' obligation to perform under very limited circumstances.[118] In addition, City of Orangeburg's claims that the buyers under the Power Sales Agreements would have an incentive to avoid taking power under those agreements to such an extent that it would undermine that mitigation is speculative and unsupported by any evidence.

64. The argument that buyers under the Power Sales Agreements might be able to avoid making purchases under those contracts is only relevant to the efficacy of the Power Sales Agreements as market power mitigation insofar as control of the energy and

[116] *Id.* at 9-12.

[117] *Id.* at 5.

[118] June 2012 Merger Order, 139 FERC ¶ 61,194 at P 98.

capacity under those agreements would revert to Applicants. The Commission, however, addressed this possibility in the June 2012 Merger Order by imposing additional restrictions on Applicants. The Commission, for example, directed Applicants to refrain from using their control over their transmission systems to thwart sales under the Power Sales Agreements; prohibited Applicants from having any priority rights over other potential buyers to repurchase any of the energy and/or capacity sold by Applicants pursuant to the Power Sales Agreements; prohibited Applicants from entering into transactions with any of the buyers under the Power Sales Agreements except on a spot basis; and significantly increased the Independent Monitor's oversight of sales under the Power Sales Agreements. While City of Orangeburg faults these additional restrictions because they do not address transmission availability specifically, we affirm our earlier decision that these additional restrictions address the potential negative effects of buyers ceding control of the energy and capacity under the Power Sales Agreements to Applicants. Accordingly, the Commission rejects City of Orangeburg's arguments on rehearing and continues to find that the interim market power mitigation proposal, as revised by the Commission in the June 2012 Merger Order, constitutes effective mitigation.

VI. The Motion to Supplement the March 2012 Compliance Filing

A. Summary

65. In the Motion to Supplement, Applicants explain that they have identified additional information relevant to the permanent market power mitigation, the transmission mitigation, that the Commission approved in the June 2012 Merger Order. Specifically, Applicants state that an independent review of the March 2012 Compliance Filing identified two assumptions used in calculating Available Transfer Capability from the Duke Energy Carolinas Balancing Authority Area to the Progress Energy Carolinas-East Balancing Authority Area that are open to question and could, depending on the methodology used in accounting for imports when performing the Delivered Price Test, affect the adequacy of the transmission mitigation accepted by the Commission.[119]

66. According to Applicants, the first assumption open to question relates to certain phase shifters on the Progress Energy Carolinas-East transmission system (Phase Shifters). Applicants explain that the independent review revealed that although Applicants accounted for the impact of the operation of the Phase Shifters on the Progress Energy Carolinas-East transmission system in calculating the Simultaneous Transmission Import Limits, they did not account for the Phase Shifters in calculating Available

[119] Motion to Supplement at 2-3.

Transfer Capability.[120] The second assumption open to question concerns the transmission limit used for calculating Available Transfer Capability. Applicants state that they used a transmission limit inside the Duke Energy Carolinas transmission system in calculating Available Transfer Capability from the Duke Energy Carolinas transmission system to the Progress Energy Carolinas-East transmission system, whereas the typical practice would have been to use limits within the Progress Energy Carolinas-East transmission system. Applicants nevertheless conclude that this assumption was not unreasonable for purposes of the Delivered Price Test because the constraint in question on the Duke Energy Carolinas transmission system serves as a binding constraint on feasible Duke Energy Carolinas to Progress Energy Carolinas-East transfers.[121]

67. Applicants state that these two findings raised sufficient concerns with the Delivered Price Test included with the March 2012 Compliance Filing that they directed the consultants performing the independent review to re-run the study with revised assumptions.[122] Applicants' consultants re-ran the Delivered Price Test using two different methodologies for accounting for imports – once under a methodology Applicants claim the Commission established in *NRG Energy, Inc.*,[123] and once under the

[120] Available Transfer Capability measures the amount of transmission capacity available to the short-term power markets across each transmission interface that may be used as a contract path. A Simultaneous Transmission Import Limit is the maximum total amount of power that can simultaneously flow into one Balancing Authority Area over all paths. Simultaneous Transmission Import Limits must be adjusted to reflect net area interchange and affiliated long-term firm transmission reservations for imports into the study area. *See Puget Sound Energy, Inc.*, 135 FERC ¶ 61,254, at P 6 (2011).

[121] Motion to Supplement at 4.

[122] Applicants state that they retained the Brattle Group as economic consultants to review the Delivered Price Test, and Quanta Technology Inc. to assist the Brattle Group in evaluating the transmission planning studies that were the basis for the calculations of the Simultaneous Transmission Import Limits and Available Transfer Capability. *Id.* 3-4.

[123] 141 FERC ¶ 61,207 (2012) (*NRG Energy*). According to Applicants, in *NRG Energy*, the Commission "clarified that imports into the destination markets from the first tier balancing areas should be modeled by 'allocating uncommitted capacity from an aggregated first tier' rather than allocating imports from first tier markets 'independently' for each destination market." Motion to Supplement at 5 (quoting *NRG Energy*, 141 FERC ¶ 61,207 at P 63). Based on *NRG Energy*, Applicants conclude that the Commission does not expect section 203 applicants to use path-specific Available Transfer Capability to determine the amount of imports from the first tier Balancing

(continued…)

same methodology Applicants have used throughout this proceeding. According to Applicants, the Delivered Price Test that allocates imports according to *NRG Energy* shows that the two assumptions identified by Applicants are "immaterial to the results" of the study and that no changes to the permanent market power mitigation are required to resolve Applicants' market power screen failures.[124] In contrast, the results of the Delivered Price Test that allocates imports in the same manner as Applicants have from the start of this proceeding show that the Stub Mitigation must be increased from 25 MW to 129 MW in order to resolve the market power screen failure it was designed to address.[125]

68. Applicants argue that in reviewing the Motion to Supplement, the Commission should use the methodology for reviewing competition in section 203 proceedings that is in effect at the time that it conducts its review.[126] Accordingly, Applicants claim that the

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Authority Areas that are attributed to Applicants' destination markets. Applicants assert that the Commission approved a section 203 application based on *NRG Energy* in *Florida Power & Light Co.*, 145 FERC ¶ 61,018 (2013) (*Florida Power & Light*), which confirms that the *NRG Energy* method for allocating imports now represents Commission practice for Delivered Price Tests in section 203 proceedings. Motion to Supplement at n.6.

[124] *Id.* at 5.

[125] As noted earlier, Applicants originally offered 25 MW of Stub Mitigation to remedy a market power screen failure in the Progress Energy Carolinas-East Balancing Authority Area during the Summer Off-Peak season/load period. June 2012 Merger Order, 139 FERC ¶ 61,194 at P 88. After re-running the Delivered Price Test model with the revised transmission assumptions identified in the Motion to Supplement, the increase in the HHI from before the Merger to after the Merger rose from 101 points to 170 points. Applicants explain that increasing the Stub Mitigation by 104 MW, from 25 MW to 129 MW, would be sufficient to remove the larger screen failure. *See* Motion to Supplement, Supplemental Affidavit of Dr. Peter Fox-Penner at P 39 (Supplemental Fox-Penner Aff.).

[126] Applicants contend that this approach has been the Commission's practice. Applicants point out that when the Commission adopted the Merger Policy Statement, it was explicit that the new standards would apply to all pending merger applications. Applicants also note that when the Commission announced the Supply Margin Assessment screen while examining triennial market power updates by electric utilities with market-based rates, the Commission applied that screen in all pending proceedings. Motion to Supplement at 6-7.

Commission should rely on the Delivered Price Test that allocates imports according to a methodology specified in *NRG Energy*, so that additional mitigation is not necessary.

B. Applicants' Response to the Request for Additional Information

69. In response to the Motion to Supplement, Commission staff directed Applicants to provide additional information. Specifically, Applicants were directed to provide additional details regarding the analyses they provided in the Motion to Supplement, particularly with respect to how they accounted for the Phase Shifters in calculating the Simultaneous Transmission Import Limits and Available Transfer Capability. In the motion, Applicants had explained that in the Delivered Price Test upon which the Commission relied in approving the market power mitigation measures, they had accounted for the Phase Shifters being in service in calculating the Simultaneous Transmission Import Limits, but had not accounted for the Phase Shifters being in service in calculating Available Transfer Capability. Among other things, the Request for Additional Information directed Applicants to explain this discrepancy and to provide new Delivered Price Tests that did *not* account for the Phase Shifters as being in service in calculating the Simultaneous Transmission Import Limits.

70. In their response to the Request for Additional Information, Applicants explain that when they calculated Available Transfer Capability and the Simultaneous Transmission Import Limits for purposes of evaluating the impact of the proposed permanent market power mitigation, they based those calculations on what they understood to be appropriate assumptions. Applicants state that, in retrospect, the Phase Shifters should have been modeled consistently in calculating the Simultaneous Transmission Import Limits and Available Transfer Capability.[127] Applicants explain that the Phase Shifters were removed from service in 2008 because they required repairs and were no longer needed to serve their original purpose. Applicants note that they have spent "$6 million since the [M]erger was consummated to repair the Phase Shifters so that they can be returned to service in connection with the [permanent market power mitigation] to increase import capability."[128] According to Applicants, the Phase Shifters

[127] *Id.*

[128] Applicants March 2014 Response at 2. Applicants state that the operation of the Phase Shifters will be reflected in Duke Energy's Open Access Same-time Information System (OASIS) and Available Transfer Capability calculations. *Id.*

will be returned to service by the 2014 summer period, prior to the permanent market power mitigation taking effect.[129] Applicants state that they have spent this amount in order to "ensure that the Phase Shifters will be in operation upon commencement of the [permanent market power mitigation] to provide the transmission capability included in the Applicants' post-mitigation [Delivered Price Test] studies."[130]

71. As directed, Applicants provided revised Delivered Price Tests based on calculations of the Simultaneous Transmission Import Limits that do *not* account for the Phase Shifters as being in service. Under the Delivered Price Test that allocates imports as Applicants have throughout this proceeding, Applicants fail the base case and the 10 percent price increase and decrease scenarios in the Summer Off-Peak season/load period. Specifically, in the base case scenario, excluding the Phase Shifters increases the HHI in the Summer Off-Peak season/load period by 395 points in a moderately concentrated market.[131] Applicants claim, however, that the Commission should not rely on the results of a Delivered Price Test that does not account for the Phase Shifters being in service in calculating the Simultaneous Transmission Import Limits. According to Applicants, doing so creates "an artificial need for other mitigation measures."[132] As a result, Applicants set forth two commitments designed to "provide assurance to the marketplace" that the Phase Shifters will be operated so as to create the additional import capability reflected in the post-mitigation Simultaneous Transmission Import Limits

[129] In the May 2014 Independent Monitoring Report, the Independent Monitor states that it received internal correspondence from Applicants indicating that the Phase Shifters were returned to service on March 27, 2014. *See* May 2014 Independent Monitoring Report at 5. On June 2, 2014, Duke Energy submitted an informational filing stating that it filed revisions to the Joint Open Access Transmission Tariff (Joint Tariff) in Docket No. ER14-2045-000 to address the use of the Phase Shifters in the calculation of Available Transfer Capability, and that it has prepared and posted on OASIS operating procedures for the Phase Shifters. *See* Duke Energy Corporation, Informational Filing, Docket No. EC11-60-004 (filed June 2, 2014).

[130] Applicants March 2014 Response at 1-2.

[131] In the base case, the HHI increases from 1,396 to 1,791. In the price increase and price decrease sensitivities, the HHIs increase from 1,469 to 1,783 (a change of 314 points) and from 1,319 to 1,512 (a change of 193 points), respectively. Applicants March 2014 Response, Attachment PFP-1A: Revised HHI Results for the CPLE Market (With and Without Phase Shifters).

[132] Applicants March 2014 Response at 3.

calculation.[133] First, Applicants commit that the Phase Shifters "will be operated as modeled in the [March 2012 Compliance Filing] in order to eliminate the same overloads and thereby increase calculated [Available Transfer Capability] into [Progress Energy-East]." Second, Applicants commit to creating and posting on Duke Energy's OASIS an operating procedure that will require Applicants to use the Phase Shifters to increase import capability "whenever this may be necessary to maintain firm transmission service transactions into [Progress Energy-East] under its Open Access Transmission Tariff (OATT)."[134]

C. Protest and Responsive Pleadings

72. City of New Bern protests the Motion to Supplement, arguing that it is actually a motion to reopen the record. As a motion to reopen the record, City of New Bern argues that Applicants fall short of making the required demonstration of "'the existence of extraordinary circumstances that outweigh the need for finality in the administrative process.'"[135] City of New Bern also disputes Applicants' claim that the Commission announced a new Delivered Price Test methodology in *NRG Energy*. According to City of New Bern, in that case the Commission corrected a specific misapplication of an import allocation methodology explained in Order No. 697.[136]

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[133] *Id.* at 5.

[134] *Id.*

[135] Answer of the City of New Bern, North Carolina to Duke's Motion to Supplement Compliance Filing at 2 (quoting *San Diego Gas & Elec. Co. v. Sellers of Mkt. Energy, etc.*, 127 FERC ¶ 61,269, at P 26 (2009)), Docket No. EC11-60-004 (Feb. 4, 2014) (City of New Bern February 2014 Answer). *See also id.* at 7-9.

[136] City of New Bern Answer to Motion to Supplement at 8 (citing *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 354 and 375, and n. 361, *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh'g*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268, *clarified*, 124 FERC ¶ 61,055, *order on reh'g*, Order No. 697-B, FERC Stats. & Regs. ¶ 31,285 (2008), *order on reh'g*, Order No. 697-C, FERC Stats. & Regs. ¶ 31,291 (2009), *order on reh'g*, Order No. 697-D, FERC Stats. & Regs. ¶ 31,305 (2010), *aff'd sub nom. Mont. Consumer Counsel v. FERC*, 659 F.3d 910 (9th Cir. 2011), *cert. denied*, 133 S. Ct. 26 (2012)).

73. City of New Bern asserts that the Motion to Supplement provides two significant reasons for the Commission to exercise its supplemental conditioning authority under section 203(b). First, City of New Bern argues that the Motion to Supplement presents a compelling case for the Commission to require that an additional 104 MW of transfer capability be reserved on the Duke Energy Carolinas to Progress Energy Carolinas-East transmission interfaces for use by parties other than Applicants and their affiliates. Specifically, City of New Bern urges the Commission to require Applicants to increase the Stub Mitigation from 25 MW to 129 MW, as Applicants have offered to do if the Commission makes certain findings.[137] Second, City of New Bern argues that the Commission's determination in *Duke Energy Carolinas, LLC*[138] that Duke Energy and Progress Energy plan their transmission system as if the two operating companies are a single entity undermines prorating the transfer capability of the Duke Energy Carolinas to Progress Energy Carolinas-East transmission interfaces in performing the Delivered Price Test.[139] According to City of New Bern, the Commission's finding in *Duke Energy Carolinas I* and *Duke Energy Carolinas II* demonstrates that the Commission should apply the Internal Interface Rule and allocate the capacity across those transmission interfaces to Applicants. City of New Bern asserts that a corrected Delivered Price Test applying the rule shows that the merger-induced increases in market concentration are more severe than those demonstrated by Applicants in the March 2012 Compliance Filing, and that additional market power mitigation beyond what the Commission

[137] *Id.* at 10.

[138] *Duke Energy Carolinas, LLC*, 142 FERC ¶ 61,130, at P 33 (2013) (*Duke Energy Carolinas I*), *reh'g denied*, *Duke Energy Corp.*, 145 FERC ¶ 61,252, at PP 44-51 (2013) (*Duke Energy Carolinas II*).

[139] The orders cited by City of New Bern address Order No. 1000 compliance filings submitted by Duke Energy Carolinas and Progress Energy Carolinas, and Alcoa Power Generating, Inc. *See Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, FERC Stats. & Regs. ¶ 31,323 (2011), *order on reh'g*, Order No. 1000-A, 139 FERC ¶ 61,132, *order on reh'g*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012). In those orders, the Commission found that Duke Energy Carolinas and Progress Energy Carolinas were a single transmission provider for purposes of determining compliance with the regional planning requirements of Order No. 1000. *See Duke Energy Carolinas I*, 142 FERC ¶ 61,130 at P 35, *Duke Energy Carolinas II*, 145 FERC ¶ 61,252 at P 44.

accepted in the June 2012 Merger Order and the additional 104 MW of Stub Mitigation that Applicants offer now, is necessary.[140]

74. Applicants dispute City of New Bern's characterization of the Motion to Supplement as a motion to reopen the record, reiterating that the purpose of the motion is to inform the Commission of an internal investigation that shows that additional market power mitigation may be necessary.[141] Applicants also assert that City of New Bern's arguments are inconsistent, insofar as City of New Bern agrees that there is no basis for reopening the record and that the *NRG Energy* allocation methodology is the correct method to apply, but simultaneously claims that the Commission should require Applicants to provide the additional Stub Mitigation.[142] Applicants reiterate that if the *NRG Energy* allocation methodology applies, no additional Stub Mitigation is required. Finally, Applicants contend that City of New Bern's arguments regarding the Internal Interface Rule are unrelated to the Motion to Supplement, and that City of New Bern fails to link its argument regarding application of that rule to the motion. Applicants argue further that City of New Bern's claims regarding the Internal Interface Rule are collateral attacks on the Commission's prior orders in this proceeding.[143] Finally, Applicants state that the Merger did not create an internal interface between Applicants, and that City of New Bern's reliance on Order No. 1000 compliance orders is misplaced.

75. In its protest of Applicants March 2014 Response, City of New Bern notes that Applicants clarified that the Phase Shifters were "'always available to be restored and placed into service if they were needed.'"[144] Based on Applicants' statements regarding the Phase Shifters, City of New Bern contends that the reactivation of the Phase Shifters was a "'foreseeable and reasonably certain'"[145] change in the regional market, and

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[140] City of New Bern Answer to Motion to Supplement at 4-5, 11-14.

[141] Motion of Duke Energy Corporation for Leave to Answer and Answer at 3, Docket No. EC11-60-004 (Feb. 19, 2014) (Applicants February 2014 Answer).

[142] *Id.* at 3-4.

[143] *Id.* at 4-10.

[144] Protest of the City of New Bern, North Carolina Concerning Duke's Response to Office Director's March 4, 2014 Request for Additional Information at 4 (quoting Applicants March 2014 Response, Supplemental Affidavit of Mr. Samuel Waters at 1), Docket No. EC11-60-004 (Apr. 14, 2014) (City of New Bern April 2014 Protest).

[145] *Id*. (quoting June 2012 Merger Order, 139 FERC ¶ 61,194 at PP 94-96).

therefore the Phase Shifters are not eligible to be counted as mitigation of the Merger's effects on competition. City of New Bern asserts that the Commission must conclude that the Phase Shifters cannot be used in the forward looking, post-mitigation analysis of the Simultaneous Transmission Import Limits, and must require Applicants to implement a 417 MW set aside over the Duke Energy Carolinas and Progress Energy Carolinas transmission interfaces.[146] In its answer to City of New Bern's protest, Applicants argue that City of New Bern has mischaracterized both Applicants March 2014 Response and the Motion to Supplement. Applicants also contend that City of New Bern repeats arguments regarding the Internal Interface Rule that were previously rejected.[147]

D. Commission Determination

76. As discussed below, we accept Applicants' offer to increase the Stub Mitigation by 104 MW (thereby raising the total amount of the set aside to 129 MW).[148] We also accept Applicants' commitments to return the Phase Shifters to service, noting that the Phase Shifters were returned to service on March 27, 2014,[149] and to operate the Phase Shifters so as to create additional import capability. Applicants' mitigation proposal presented in the March 2012 Compliance Filing modeled the Phase Shifters as being in service and the Commission therefore approved the Merger based on this understanding in the June 2012 Merger Order.

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[146] *Id.* In Applicants March 2014 Response, Applicants explain that if the Phase Shifters are not factored into the Delivered Price Test as mitigation, a set-side of 417 MW would be required to resolve the largest screen failure. *See* Applicants March 2014 Response at n.3; Supplemental Fox-Penner Aff. at P 8, n.5.

[147] Motion of Duke Energy Corporation for Leave to Answer and Answer, Docket No. EC11-60-004 (May 5, 2014).

[148] The Commission notes that the existing 25 MW of Stub Mitigation was accepted subject to several restrictions, including that Applicants would not claim any kind of native load or other priority over the 25 MW set aside. *See* June 2012 Merger Order, 129 FERC ¶ 61,194 at P 31-34, 89 (describing and accepting the Stub Mitigation). The Commission clarifies that the restrictions that currently apply to the 25 MW of Stub Mitigation will also apply to the additional 104 MW of Stub Mitigation accepted in this order.

[149] *See* n.129, *supra*.

77. As noted above, Applicants state that, in retrospect, they understand that they should have modeled the Phase Shifters consistently in calculating the Simultaneous Transmission Import Limits and Available Transfer Capability for purposes of the Delivered Price Test.[150] Applicants' analyses demonstrate that if the Phase Shifters are not included in the transmission model upon which the Delivered Price Test is based, the transmission mitigation will not mitigate the market power screen failure in the Summer Off-Peak season/load period.[151] Thus, the remedial effects Applicants claimed the transmission mitigation would provide are dependent upon whether the Phase Shifters are operational – if the Phase Shifters are not operated, the transmission mitigation will not provide the increase in the Simultaneous Transmission Import Limits that Applicants claimed it would provide. Accordingly, we accept Applicants' commitments to return the Phase Shifters to service, noting that they were returned to service on March 27, 2014, and to operate them so as to increase import capability and remedy the market power screen failure. We accept the increase to the Stub Mitigation for the same reasons.[152]

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[150] Applicants March 2014 Response at 2.

[151] *Id.*, Supplemental Fox-Penner Aff. at P 7.

[152] In this proceeding, which began when Applicants filed the Merger Application in April 2011, the evidentiary record was developed using, and the analyses provided by Applicants and commenters were based upon, Delivered Price Tests that allocate imports from the first-tier markets independently, rather than allocating uncommitted capacity from an aggregated first tier market. Thus, for the sake of consistency among the evidentiary studies on this record, in accepting the additional mitigation we continue to rely on Delivered Price Tests that apply that method and set aside Applicants' arguments regarding *NRG Energy*, which was issued December 2012. *See Consolidated Edison Company of New York, Inc. v. Fed. Energy Reg. Comm'n*, 315 F.3d 316 (D.C. Cir. 2003) (*Consolidated Edison*) (upholding the Commission's decision to apply a prior policy statement where the evidentiary record was developed on the basis of that prior policy statement). *See also Kern River Gas Trans. Co.*, 126 FERC ¶ 61,034, at P 38 (2009) (discussing *Consolidated Edison*). Moreover, Applicants misunderstand the Commission's actions in *NRG Energy*. In that proceeding, the Commission simply reiterated its conclusions in Order No. 697 regarding the proper allocation of simultaneous transmission import capability. *NRG Energy*, 141 FERC ¶ 61,207 at P 63 n.112 (citing *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, FERC Stats. & Regs. ¶ 31,252, at n.361 & P 375, *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh'g*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268, *clarified*, 124 FERC ¶ 61,055, *order on reh'g*, Order No. 697-B, FERC Stats. & Regs. ¶ 31,285 (2008), *order on reh'g*, Order No. 697-C, FERC

(continued…)

78. We remind Applicants that applications submitted under section 203 must be complete and accurate and that if errors or omissions with those filings are discovered, the Commission should be notified as soon as practicable. Applicants' March 2012 mitigation proposal modeled the Phase Shifters as being operable and in service even though they were not.[153] Because using the Phase Shifters was contrary to Applicants' normal operating procedure, Applicants should have disclosed at the time they were first proposing mitigation that the Phase Shifters were in disrepair and included the repair as part of the mitigation proposal submitted to the Commission for approval. Consequently, we have referred this matter to the Commission's Office of Enforcement for further examination and inquiry, as may be appropriate.

79. We acknowledge Applicants' commitments to operate the Phase Shifters so as to remedy the remaining screen failure in the summer off-peak season/load period, and will monitor the operation of the Phase Shifters, and Applicants' other Merger-related commitments, so as to ensure that there is no adverse effect on competition.[154] To that end, we will require the Independent Monitor to monitor Applicants' compliance with

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Stats. & Regs. ¶ 31,291 (2009), *order on reh'g*, Order No. 697-D, FERC Stats. & Regs. ¶ 31,305 (2010), *aff'd sub nom.* Montana *Consumer Counsel v. FERC*, 659 F.3d 910 (9th Cir. 2011)). The Commission accepted applicants' study in *NRG Energy* based on the particular circumstances of that case, where "a large amount of uncommitted generation in the particular study areas negate[d] the [oversimplified *pro rata* allocation methodology] flaw in [a]pplicants' model." *NRG Energy*, 141 FERC ¶ 61,207 at P 64. The Commission did not in *NRG Energy* implement a new policy on the calculation or allocation of Simultaneous Transmission Import Limits that disregards the physical transfer limitations of the grid. We also disagree with Applicants' claim that the Commission's actions in *Florida Power & Light* confirm that the *NRG Energy* method for allocating imports now represents Commission practice for Delivered Price Tests in section 203 proceedings.

[153] As noted in n.129, *supra*, the Phase Shifters were not returned to service until March 27, 2014.

[154] We note that Applicants proposed amendments to Applicants' Joint Open Access Transmission Tariff to account for the operation of the Phase Shifters. The proposed revisions state that Duke Energy Progress, Inc. "will operate the phase shifters in accordance with the operating procedures posted on OASIS; and that the ATC flowgates which monitors the applicable transmission lines will be modelled to include such operation of the phase shifters." *See* Amendments to Joint Open Access Transmission Tariff, Docket No. ER14-2045-000 (filed May 27, 2014).

their commitments regarding operation of the Phase Shifters. Currently, the Independent Monitor monitors compliance with the 25 MW Stub Mitigation commitment and files periodic reports with the Commission detailing the extent of Applicants' compliance with that commitment.[155] The Commission here imposes a similar requirement with respect to Applicants' operation of the Phase Shifters. As part of the periodic report regarding the Stub Mitigation, the Independent Monitor shall also report on Applicants' operation of the Phase Shifters; the impact of the Phase Shifters on calculating Available Transmission Capability;[156] and the extent of third-party use of Available Transmission Capability during the Summer Off-Peak season/load period (the season during which Applicants will operate the Phase Shifters in accordance with the Joint Tariff and relevant operating guides). The Commission finds that this additional reporting obligation will ensure that Applicants are operating the Phase Shifters in such a way that the remaining market power screen failures are mitigated.

80. The Commission also reminds Applicants that the Stub Mitigation must remain in effect unless and until the Commission determines that it is no longer required.[157] Accordingly, the Commission expects that, if Applicants seek to remove the Stub Mitigation, they will submit a Delivered Price Test showing that, if the Stub Mitigation were removed, the change in post-merger market concentration in the Progress Energy Carolinas-East Balancing Authority Area from pre-merger market concentration levels would satisfy the applicable HHI thresholds. This approach is consistent with the Commission's section 203 analysis as it is tied directly to evaluating changes in market concentration due to the Merger.

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[155] *See* March 2012 Compliance Filing at 18. The Independent Monitor filed its first report regarding the Stub Mitigation on September 30, 2014. *See* Seasonal Independent Market Monitoring Report on Duke Energy Corporation and Progress Energy Inc. on "Stub" Mitigation Measures, Docket No. EC11-60-004 (Sept. 30, 2014).

[156] This aspect of the report should include the following information: the number of hours, and the hours during which, Available Transmission Capability was zero, if any; the number of hours, and the hours during which the Phase Shifters were operated; an explanation of how the Phase Shifters were operated to increase imports; and the number of hours, and the hours during which, the Phase Shifters were bypassed, if any.

[157] *See, e.g.*, June 2012 Merger Order, 139 FERC ¶ 61,194 at P 88, n. 221 (quoting March 2012 Compliance Filing at 17).

81. Consistent with the Commission's requirements that Applicants hold transmission and wholesale requirements customers harmless for five years from (1) costs related to the Merger;[158] (2) costs of the transmission expansion projects;[159] and (3) any losses incurred under the Power Sales Agreements,[160] the Commission requires Applicants to hold transmission and wholesale requirements customers harmless for five years from costs related to the Phase Shifters, including any costs associated with repairing the Phase Shifters and returning them to service, as referred to by Applicants in Applicants March 2014 Response.[161]

82. We dismiss City of New Bern's arguments regarding the Motion to Supplement. With respect to City of New Bern's arguments regarding application of the Internal Interface Rule, we refer City of New Bern to our discussion regarding this issue above, where we concluded that the evidence in this record supports a finding that the transmission interfaces between Duke Energy Carolinas and Progress Energy Carolinas will not become internal to the merged company.[162] In addition, we disagree with City of New Bern's claim that our findings in *Duke Energy Carolinas I* and *Duke Energy Carolinas II* compel a determination that the transmission interfaces between Duke Energy Carolinas and Progress Energy Carolinas have become internal to the company. Those orders found that "Duke-Progress is a single transmission provider *for determining compliance with the regional planning requirements for purposes of Order No. 1000*."[163] Accordingly, these orders are not relevant to this case.

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[158] September 2011 Merger Order, 136 FERC ¶ 61,245 at P 169.

[159] June 2012 Merger Order, 139 FERC ¶ 61,194 at P 91.

[160] *Id.* P 109.

[161] *See, e.g.*, Applicants March 2014 Response at 1, Supplemental Affidavit of Mr. Samuel Waters at 1, 2 (Waters Aff.).

[162] *See* PP 26-28, *supra*.

[163] *Duke Energy Carolinas I*, 142 FERC ¶ 61,130 at P 35 (emphasis added); *Duke Energy Carolinas II*, 145 FERC ¶ 61,252 at P 44 ("We deny Duke-Progress' request for rehearing and affirm the finding in [*Duke Energy Carolinas I*] that Duke and Progress are not separate transmission providers *for purposes of determining compliance with the regional transmission planning requirements of Order No. 1000*") (emphasis added)).

83. Finally, we reject City of New Bern's arguments in its protest of Applicants March 2014 Response to the Request for Additional Information. City of New Bern's primary argument against the Commission accepting the Phase Shifters as additional market power mitigation is that the "ready reactivation" of the Phase Shifters was a foreseeable and reasonably certain change in the regional market. Applicants have explained, however, that they "considered restoration and return to service of the Phase Shifters to be an obligation associated with [the transmission mitigation] commitments,"[164] and that the Phase Shifters "were not planned to be restored absent the merger."[165] Based on these statements we find, contrary to City of New Bern's claims, that the record shows that the operation of the Phase Shifters was not a foreseeable and reasonably certain change in the market, since the Phase Shifters were not planned to be restored absent the merger, and therefore it is appropriate for the Commission to accept operation of the Phase Shifters as merger-related market power mitigation.[166] Consistent with Applicants' statements and their commitments set out in their response to the Request for Additional Information, as discussed above, we accept the operation of the Phase Shifters as additional market power mitigation.[167]

The Commission orders:

(A) The requests for rehearing are denied, as discussed in the body of this order.

(B) The Motion to Supplement is granted, as discussed in the body of this order.

(C) Applicants are directed to increase the Stub Mitigation by 104 MW (thereby raising the total amount of the transmission set aside to 129 MW) and to operate the Phase Shifters so as to create additional transmission import capability and remedy the market power screen failure, as discussed in the body of this order.

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[164] Applicants March 2014 Response, Waters Aff. at 2.

[165] *Id.*, Supplemental Fox-Penner Aff. at P 18.

[166] *See Oklahoma Gas and Elec. Co.*, 105 FERC ¶ 61,297, at P 32 (2003).

[167] With respect to City of New Bern's arguments regarding the Internal Interface Rule, we refer City of New Bern to our determination in PP 26-28 of this order.

(D) The scope of the periodic report on the Stub Mitigation by the Independent Monitor shall be expanded to include operation of the Phase Shifters, as discussed in the body of this order.

(E) The Commission retains authority under sections 203(b) and 309 of the FPA to issue supplemental orders as appropriate.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.